

**No. 07-72750**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 21, AFL-CIO**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

**and**

**LUCENT TECHNOLOGIES**

**Intervenor**

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**ON PETITION FOR REVIEW OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

This case is before the Court on the petition of International Brotherhood of Electrical Workers, Local 21, AFL-CIO (“the Union”) to review portions of the Board’s Decision and Order issued against Lucent Technologies (“Lucent”) and AG Communication Systems Corporation (“AG”), a single employer. The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a) (“the Act”)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Board’s Decision and Order issued on June 29, 2007, and is reported at 350 NLRB No. 15.<sup>1</sup> That Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). In its Decision and Order, the Board dismissed a complaint allegation that Lucent and AG, who were found to be a single employer during the relevant period, unlawfully failed to bargain with the Union about

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<sup>1</sup> The Union has filed a separately-bound “Appendix,” which includes the Board’s Decision and Order at pages 24 through 38. The Board’s record references refer to the Union’s “Appendix” as “UER”; “BSER” refers to the Board’s Supplemental Excerpts of Record; “Tr” refers to the transcript of the hearing below; “GCX” refers to exhibits introduced by the Board’s General Counsel at the hearing. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “UBr” refers to the Union’s brief.

Lucent's decision to integrate a bargaining unit of AG telephone equipment installers represented by the Union into a bargaining unit of Lucent telephone equipment installers represented by another union, the Communication Workers of America ("CWA"). Although the Board found that the decision to integrate the two bargaining units was exempt from bargaining because it was an inseparable part of a core entrepreneurial decision, it found that Lucent's and AG's refusal to bargain with the Union over the *effects* of the decision was a violation of the Act. To remedy that violation—which was the only one the Board found—the Board entered an order imposing cease-and-desist and notice-posting requirements.<sup>2</sup>

On July 12, 2007, the Union filed a petition for review of the part of the Board's Decision and Order dismissing the allegation that Lucent and AG had unlawfully failed to bargain with the Union about the decision to integrate the two bargaining units. The Union also contends that, to remedy the effects-bargaining violation, the Board should have entered the kind of effects-bargaining remedies set out in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). The petition was timely filed, as the Act places no time limitations on such filings. On August 30, 2007, the Court granted Lucent's motion to intervene on behalf of the Board.

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<sup>2</sup> The Board has not filed an application for enforcement of its Decision and Order with the Court, because the Board's Subregional Office has administratively advised it that Lucent has complied with the Decision and Order.

## **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board rationally found that Lucent's decision to integrate the AG bargaining unit of telephone equipment installers into the Lucent bargaining unit of telephone equipment installers—which was just one aspect of its decision to close AG as a stand-alone subsidiary and integrate it into Lucent—was exempt from collective bargaining as a core entrepreneurial decision.

2. Whether the Board, upon finding that Lucent and AG had unlawfully refused to bargain with the Union over the effects of the decision to integrate the two bargaining units, abused its broad remedial discretion by confining its remedy, in the circumstances of this case, to a cease-and-desist order and a notice-posting requirement.

## **STATEMENT OF THE CASE**

Acting on charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against Lucent and AG, alleging that Lucent and AG constituted a single employer during the relevant period, and violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union about the decision to integrate a unit of AG telephone equipment installers represented by the Union into a unit of Lucent telephone equipment installers represented by the CWA. The complaint also alleged that Lucent and AG violated Section 8(a)(5) and (1) by failing to bargain with the Union about the

effects of that integration decision. (UER 24, 34.) Following a hearing, an administrative law judge issued a recommended decision dismissing the complaint allegations in their entirety. (UER 34-38.)

The General Counsel and the Union each filed exceptions to the judge's decision; AG and Lucent filed cross-exceptions. In its Decision and Order, the Board supplied its own reasoning in affirming the judge's finding that Lucent and AG were not required to bargain with the Union about the decision to integrate the unit of AG employees represented by the Union into the unit of Lucent employees represented by the CWA. Although the Board found that the decision to integrate the two bargaining units was itself exempt from bargaining, the Board reversed the judge's finding that Lucent and AG were not obligated to bargain with the Union about the effects of that decision. The Board determined that cease-and-desist and notice posting remedies were appropriate measures to remedy the effects-bargaining violation. (UER 24-30.)

As noted above, the Union challenges the Board's dismissal of the allegation that Lucent and AG unlawfully failed to bargain with it over the decision to integrate the two bargaining units; the Union also challenges the Board's failure to issue the effects-bargaining remedies that were set out in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

## **STATEMENT OF FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. Background; Lucent's Operations; the CWA Represents Lucent's Telephone Equipment Installers for Purposes of Collective Bargaining**

Lucent manufactures, sells, and installs telephone switching equipment. It is a global enterprise with billions of dollars in revenue, and its large base of customers includes governments, communications services providers, and various other types of enterprises. (UER 24; BSER 72, 80.) The products and services in Lucent's portfolio include central office switching equipment, transmission switching equipment, and wireless equipment. (UER 24, 34; BSER 72, 80.) For several years, Lucent's primary product was a telephone circuit switch called the 5-ESS. (UER 25; BSER 82.)

Lucent normally provides its customers with installation services for the telephone equipment products that they have purchased. (Tr 724-25.) In 2003, Lucent employed a nationwide bargaining unit of approximately 2,700 telephone equipment installers who were represented, for purposes of collective bargaining, by the CWA. (UER 24, 34; BSER 90.) Lucent and the CWA were parties to a collective-bargaining agreement that was effective from March 1, 2003 until October 31, 2004. (UER 24; GCX 3.)

**B. In 1989, the Corporate Predecessors of Lucent and Verizon Formed a Joint Venture Called AG; the Union Represented a Unit of AG Telephone Equipment Installers for Purposes of Collective Bargaining**

In 1989, the corporate predecessor of Lucent and the corporate predecessor of Verizon formed an entity called AG as a stand-alone joint venture company.<sup>3</sup> (UER 1, 35; BSER 10, 25 34, GCX 4-5.) AG—which existed until August 1, 2003, when it was integrated into Lucent’s operations and ceased to operate—engineered, manufactured, sold, and installed telephone switching equipment. (UER 24, 35; BSER 5.) AG was a smaller enterprise than Lucent. (UER 35; Tr 513, LX 9(a), 10.)

AG’s main customer was Verizon, and its primary product was a type of telephone system switch called the GTD-5, which was a competitor switch to Lucent’s 5-ESS; customers would buy either one of the switches. (UER 35; BSER 13-14, 82-83.) Lucent sold many more switches than AG, but AG and Lucent competed against each other in certain areas. (UER 35; BSER 52, 116.)

To perform its telephone equipment installation services, AG employed over 200 telephone equipment installers. (UER 24; BSER 90.) AG’s telephone equipment installers and Lucent’s telephone equipment installers performed basically the same type of work, but on different telephone switching equipment.

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<sup>3</sup> Lucent’s corporate predecessor was AT&T; Verizon’s corporate predecessor was GTE, which merged with Bell Atlantic to form Verizon. (UER 35; BSER 72, 152.)

(UER 24; BSER 13-14, 82-83.) From 1998 until 2003, the Union represented a bargaining unit of AG's telephone equipment installers for purposes of collective bargaining. (UER 24; BSER 6-7, 90, 103.) AG and the Union were parties to a collective-bargaining agreement effective from October 1, 2000 to September 30, 2004. (UER 24; BSER 6-7, 35-36, GCX 2.) AG also employed hundreds of non-represented employees. (LX 9(a), LEX 10.)

**C. In Order To Streamline Operations, Reduce Redundancies, and Increase Profitability, Lucent Decides To Integrate AG Into Lucent and Close AG**

The joint venture agreement between Lucent and Verizon that established AG initially made Verizon the majority shareholder in AG for the first few years, but required that Lucent buy an increasing share of AG stock, so that by the end of 2003 Lucent would own all of the shares. (UER 35; BSER 26-27, 31-33, 43-44, 73-74.)

Pursuant to the acquisition timetable contained in the joint venture agreement, Lucent became the majority shareholder in AG after 1994. Lucent increased its percentage of AG's stock during the following years. By 2002, Lucent owned approximately 90 percent of AG's shares. (UER 35; BSER 26, 28-30, 43)

Around that time, Lucent's executives decided that, in order to streamline operations, reduce redundancies, and increase profitability, Lucent should integrate

AG—which operated as a stand-alone and self-contained entity with its own organizational hierarchy—into its operations, and close AG. By absorbing functions performed by the significantly smaller AG that overlapped with Lucent’s functions and departments—such as finance, human resources, payroll, ordering systems, legal support, security, and information technology—Lucent determined that it would gain efficiencies of scale, achieve savings, and increase profitability. (UER 24-25, 27-28; BSER 37-40, 44-48, 51, 56-57, 74, Tr 513.) Other costly redundancies that Lucent’s officials believed could be eliminated included duplication in the areas of tools, test sets, vehicles, and real estate. (UER 36; BSER 87.) Lucent also determined that by integrating AG’s operations into Lucent, Lucent would be able to raise its corporate profile and sell a different type of telephone installation equipment to a new set of customers. (UER 28; BSER 65-66, 81-82, 125.)

#### **D. Lucent Becomes the Complete Owner of AG in February 2003**

In order to carry out the integration of AG into Lucent, Lucent decided to obtain complete control of AG by purchasing the remaining 10 percent of AG shares from Verizon on February 3, 2003. This purchase occurred 11 months ahead of the scheduled date on which Lucent was obligated to buy the final shares

of AG.<sup>4</sup> (UER 35; BSER 44, 49-51, LX 9(a).) Lucent determined that the price of the buyout measured against the present value of the integration would result in savings. (Tr 454, BSER 51.)

Upon becoming the complete owner of AG, Lucent circulated an internal memorandum describing the planned integration of the stand-alone AG into Lucent; one component of this overall, large-scale plan involved integrating the bargaining unit of AG installers represented by the Union into the bargaining unit of Lucent installers represented by the CWA. (UER 24, 28; BSER 11-12, 19, 37-38, 49-53.) It then embarked upon the complex process of coordinating and executing this large-scale integration endeavor. The restructuring involved integrating all systems and processes in order to achieve an organizational alignment of AG into Lucent. (UER 24; BSER 54-55, 58-61, 63-64.) By April 1, most departments of AG were integrated into Lucent, and Lucent assumed operational and budgetary responsibility for those departments. (UER 25-27.)

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<sup>4</sup> Lucent bought the last 10 percent of the shares ahead of schedule because Verizon, which remained as a minority shareholder until the final purchase, had not consented to the integration of AG into Lucent. (UER 35; BSER 76.)

**E. Lucent Fully Integrates AG into Its Operations on August 1, 2003, and AG Ceases Operations; as Part of the Integration, the Separate Units of Telephone Equipment Installers Become a Single Unit Represented by the CWA; the Former AG Installers Retain Full Pay, Full Benefits, and Full Seniority**

As part of the overall integration of AG into Lucent, Lucent also began to integrate the AG telephone installers into Lucent. On July 17, Lucent notified the Union that, as of August 1, the AG telephone equipment installers would be integrated into a single operational group with the Lucent telephone equipment installers. (UER 35-36; BSER 117, 121-22.) Lucent further notified the Union that, as of August 1, all telephone equipment installers would be represented by CWA in a single bargaining unit covered by the Lucent-CWA collective-bargaining agreement, and that AG installers would be assigned appropriate job titles under the Lucent-CWA collective-bargaining agreement. (UER 35; BSER 121-22.) Finally, Lucent informed the Union that the Union would no longer be recognized as the representative of the AG equipment installers. (UER 35; BSER 121-22.) On July 21, the Union requested bargaining with both AG and Lucent over the effects of the decision to merge the two bargaining units. Neither AG nor Lucent responded. (UER 28; Tr 677.)

On August 1, which was the date on which AG ceased to exist as an operating entity, the integration of the two units into a single unit represented by

the CWA was completed. (UER 35; Tr 404, 570, 754-55 BSER 41, 89.) As of that date, telephone equipment installers who had been employed by AG became Lucent employees, and Lucent applied the terms of its collective-bargaining agreement with CWA to them. (UER 25, 29; BSER 63, 89, 93.) The former AG installers shared common working conditions and terms of employment with Lucent installers, and continued to be employed with full pay and full benefits. (UER 29; LX 20, BSER 63, 89, 93, 134-50.) Lucent dealt exclusively with CWA as the bargaining representative of the former AG employees. (UER 25; Tr 755, BSER 93.) Lucent bargained with CWA over the effects of the integration, and a positive outcome for the former AG installers was achieved. (UER 25, 29 35; BSER 104, 120.) Among other things, as a result of that bargaining, the seniority lists of the two units of installers was dovetailed, giving each former AG installer a seniority date with Lucent that fully reflected his or her service with AG. (UER 25, 29; BSER 104, 120.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Battista, Members Schaumber and Walsh) found that Lucent and AG did not violate the Act by failing to bargain with the Union over the integration of the bargaining unit of AG telephone equipment installers represented by the Union into the bargaining unit of Lucent telephone equipment installers represented by the CWA. The Board found that the

integration of the two bargaining units was one part of the core entrepreneurial decision to undertake a comprehensive business reorganization, and was exempt from bargaining under settled principles. (UER 27-28.)

However, the Board (Chairman Battista, Members Schaumber and Walsh) did find that Lucent and AG unlawfully failed to bargain with the Union over the *effects* of the decision to integrate the two bargaining units. (UER 28.) In the unusual circumstances of this case, the Board (Chairman Battista and Member Schaumber; Member Walsh, dissenting) found that cease-and-desist and notice-posting remedies were the appropriate measures for ameliorating the effects of this violation, and that the *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) effects-bargaining remedies of a limited bargaining order and backpay were unwarranted. (UER 28-30.)

### **SUMMARY OF ARGUMENT**

The Board rationally dismissed a complaint allegation that Lucent and AG unlawfully refused to bargain with the Union about the decision to integrate the unit of AG telephone equipment installers represented by the Union into the larger unit of Lucent telephone equipment installers represented by the CWA. Applying *First National Maintenance*, 452 U.S. 666 (1981), the Board found that the decision to integrate the two bargaining units was exempt from mandatory bargaining because it was a part of, and wrapped up in, Lucent's overall core

entrepreneurial decision to integrate the operations of AG into Lucent, and close AG's operations. The Union's challenges to this finding are jurisdictionally barred because they were never presented to the Board. In any event, they have no merit. They fly in the face of the Board's reasonable findings, and rely on little more than citations to inapposite cases.

Although the Board found that Lucent and AG did not have a duty to bargain with the Union over the decision to integrate the two bargaining units, the Board did find that Lucent and AG unlawfully refused to bargain with the Union over the *effects* of that decision. Exercising its broad discretion to fashion an appropriate remedy for that violation, the Board reasonably determined that the violation could be ameliorated with a cease-and-desist order and a notice-posting requirement. As the Board explained, in the unusual circumstances of the case, it was unnecessary to enter the additional *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) effects-bargaining remedies. As a practical matter, there was nothing to bargain about. Former AG installers continued to be employed by Lucent with full pay, full benefits, and full credit for their seniority with AG. In addition, in such circumstances, awarding former AG installers limited backpay would result only in an unfair economic windfall for them.

The Union has done nothing to show that the Board abused its discretion. Indeed, its challenges are untimely, because they were never presented to the

Board. Therefore, they are jurisdictionally barred. In any event, the challenges are without merit.

## **ARGUMENT**

### **I. THE BOARD RATIONALLY FOUND THAT THE INTEGRATION OF THE BARGAINING UNIT OF AG TELEPHONE EQUIPMENT INSTALLERS INTO THE BARGAINING UNIT OF LUCENT TELEPHONE EQUIPMENT INSTALLERS WAS EXEMPT FROM THE MANDATORY DUTY TO BARGAIN**

#### **A. Applicable Principles and Standard of Review**

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees . . . .” Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” However, bargaining is only mandatory with respect to subjects that fall within the statutory language, and the Board’s judgment as to what is or is not a mandatory subject is entitled to considerable deference: The Board has “special expertise” in this area, and if its determination is reasonably defensible, “it should not be rejected, merely because the courts might prefer another view of the statute.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495, 497 (1979); *Retlaw*

*Broadcasting Co. v. NLRB*, 172 F.3d 660, 664, 669 (9th Cir. 1999) (the Board’s judgment as to whether a bargaining subject is mandatory or not will not be lightly disturbed); *see also First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677-79 (1981) (“*First National Maintenance*”)

When the Board finds that allegedly unlawful conduct does not violate the Act, and accordingly dismisses a complaint allegation, the Board’s determination must be upheld unless it has no rational basis. *Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978). *Accord American Postal Workers Union v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004).<sup>5</sup>

The Board’s underlying findings of fact are “conclusive” if they are supported by substantial evidence on the record considered as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951). On review, a court may not displace the Board’s choice between fairly conflicting views of the evidence, even if the court justifiably would have made a different choice had the matter been before it *de novo*. *Id.* at 488.

*Accord NLRB v. Champ Corp.*, 933 F.2d 688, 691 (9th Cir. 1990); *see also*

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<sup>5</sup> Many other Circuits also apply the rational basis standard when reviewing the Board’s determination that the Act was not violated. *See Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.3d 187, 201 (4th Cir. 2000); *United Paperworkers Int’l Union v. NLRB*, 981 F.2d 861, 865 (6th Cir. 1992); *Louisiana Dock Co. v. NLRB*, 909 F.2d 281, 286 (7th Cir. 1990); *Allbritton Communications Co. v. NLRB*, 766 F.2d 812, 817 (3d Cir. 1985); *Ona Corp. v. NLRB*, 729 F.2d 713, 725 (11th Cir. 1984).

*Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 286-88 (D.C. Cir. 1991) (in dismissal cases, the “rational basis standard essentially particularizes the general rule that the court will defer to the Board’s findings of fact supported by substantial evidence on the record considered as a whole.”). In sum, as the D.C. Circuit has emphasized, in these circumstances, a court “will reverse the Board’s factual determinations only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *United Food & Commercial Workers Union Local 204 v. NLRB*, 506 F.3d 1078 (D.C. Cir. 2007).<sup>6</sup>

As we now show, the Board rationally dismissed the allegation that Lucent and AG unlawfully failed to bargain with the Union about the decision to integrate the two bargaining units of telephone equipment installers. The Board reasonably found that it was the decision to undertake a comprehensive business reorganization that drove the decision to integrate the two bargaining units, and

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<sup>6</sup> To the extent that this Court’s panel decision in *Healthcare Employees Union v. NLRB*, 463 F.3d 909, 918 n.12 (9th Cir. 2006) can be read to reject categorically rational basis as a standard for reviewing Board dismissals, that decision is not precedential because that panel lacked authority to overrule the prior decision in *Chamber of Commerce*, absent intervening Supreme Court or en banc authority. See *Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006); see also *Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760, 765 (3d Cir. 1997) (reiterating Third Circuit practice that, to the extent that a later panel decision is contradictory to earlier one, the earlier holding is the precedential one). Since *Healthcare*, another panel of this Court used the “rational basis” standard and cited *Chamber of Commerce* to uphold the Board’s decision not to make particular findings. *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 632-33 (9th Cir. 2007).

reasonably concluded that the reorganization decision lay at the core of entrepreneurial control and was outside the mandatory duty to bargain.

**B. The Board Rationally Found that the Integration of the Bargaining Unit of AG Installers into the Unit of Lucent Installers Was Exempt from the Mandatory Duty to Bargain**

The Board rationally concluded that, under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), Lucent and AG were not required to bargain over the integration of the two bargaining units, which was simply one part of—and could not reasonably be separated from—Lucent’s overall core entrepreneurial decision (BSER 46, 74, 87) to integrate its stand-alone subsidiary AG into its operations and shut down AG’s operations. (UER 27-28.)

In *First National Maintenance* (*id.* at 677-79)—a case involving an employer’s partial closing of its operations for core economic reasons—the Supreme Court identified as exempt from mandatory bargaining a category of management decisions that, although they have a direct impact on employment, are focused on ‘big picture’ core entrepreneurial concerns apart from the employment relationship, such as economic profitability. As the Court stated, bargaining over such management decisions should be required “only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden

placed on the conduct of the business.” *Id.* at 679.<sup>7</sup> The Court noted that bargaining would be “amenable” only if the decision was driven by a “desire to reduce labor costs.” *Id.* at 680.

Applying this framework, the Board rationally concluded (UER 27-28) that the decision to integrate the two bargaining units was not a mandatory subject of bargaining. This decision was wrapped up in, and could not reasonably be separated from, the overall core entrepreneurial decision to integrate AG into Lucent. (UER 27-28.)

Thus, the Board found (UER 27-28), and the Union does not even dispute, that the overall decision to integrate AG into Lucent was animated by Lucent’s desire to streamline operations, increase profitability, and secure the opportunity to sell a different type of telephone switching equipment to a new set of customers. In this regard, the overall decision to integrate AG into Lucent and shut down AG’s operations was precisely the type of ‘big picture’ entrepreneurial action that lay at the core of Lucent’s entrepreneurial control. Lucent’s executives had determined that Lucent should absorb the operations of AG—a stand-alone and significantly smaller subsidiary whose core business operations duplicated Lucent’s in many significant respects—and perform those functions more

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<sup>7</sup> The employer is, however, required under the Act to bargain about the *effects* of such a decision on bargaining-unit employees. *Id.* at 677 n.15, 681-82.

efficiently. (UER 27-28; BSER 56, 74.) Executives determined that improved efficiencies would result from this business action, and that Lucent would increase its profitability. (UER 27-28; BSER 51, 74.) Specifically, executives determined that by integrating stand-alone AG into Lucent and closing AG, they could eliminate redundancies in the areas of human resources, payroll, ordering systems, legal support, information technology, security, real estate, tools, and equipment. (UER 27-28, BSER 44-48, 74, 87.) Lucent also determined that the integration of AG into its operations would raise its corporate visibility and secure the opportunity to sell a different type of telephone switching equipment to a new set of customers—a change in scope and direction. (UER 27-28; BSER 56, 125.)

The overall decision to integrate AG into Lucent and close AG's operations was not animated by a desire to reduce labor costs related to the bargaining unit telephone equipment installers, and the Union does not argue otherwise. (UER 27-28; LX 9(a).) The decision to integrate the two bargaining units was, as mentioned above, a part of, and wrapped up in, this overall integration of AG into Lucent, and the Board noted that even this lesser-included decision (the integration of the two bargaining units) was not animated by a desire to reduce labor costs. (UER 27-28; BSER 87, 663.)

In the circumstances of this case, the Board reasonably observed (UER 28) that the overall integration decision was a “comprehensive business

reorganization” that involved large-scale organizational restructuring conducted by joint teams of managers who had to plan and execute the complex endeavor. In these circumstances, separating out the decision to integrate the two units for mandatory bargaining “would place a significant burden on the . . . achievement” of Lucent’s core economic goal. (UER 28.) Accordingly, the Board, appropriately applying *First National Maintenance*, reasonably found that the decision to integrate the bargaining units “was not suitable” (UER 28) for resolution through the collective-bargaining process because it was a part of, and wrapped up in, an overall integration that lay at the core of Lucent’s entrepreneurial discretion. It would simply have been unreasonable to separate out this single component of a comprehensive economic decision for bargaining. *See Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 223 (Stewart, J. concurring).

**C. The Union’s Challenges to this Finding Are Untimely,  
and the Court Is Therefore Jurisdictionally Barred  
from Considering Them; in any Event, the Challenges  
Are Without Merit**

Before this Court, the Union now asserts (UBr 21-22), for the first time that the decision to integrate the two units should be separated out for bargaining because “labor costs” relating to the former AG telephone equipment installers were a “factor” in the decision to integrate the two bargaining units.<sup>8</sup> Judicial

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<sup>8</sup> The Union does not contend that the overall decision to integrate AG into Lucent and close AG’s operations was animated by a desire to reduce labor costs.

consideration of this claim is precluded by Section 10(e) of the Act (29 U.S.C. § 160(e)), which provides, in relevant part, that “no objection that has not been urged before the Board . . . shall be considered by the Court,” absent extraordinary circumstances not present here. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord NLRB v. Ed Chandler Ford*, 718 F.2d 892, 894 (9th Cir. 1983); *Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1303 (9th Cir. 1978).

In its decision, the Board explicitly observed (UER 28) that the Union (and the General Counsel) had not even argued that labor costs were lower under Lucent’s collective-bargaining agreement with the CWA than under AG’s collective-bargaining agreement with the Union. Even in the face of the Board’s highlighting the Union’s failure to advance this argument, the Union chose not to file a motion for reconsideration of the Board’s Decision and Order, in which it could have raised this matter. *See* NLRB Rules and Regulations, 29 C.F.R. § 102.48(d)(2) (motions for reconsideration, which may assert, among other things, that the Board made material factual errors, “shall be filed within 28 days . . . after service of the Board’s decision and order”). Accordingly, under settled principles, the Court lacks jurisdiction to consider it. Simply put, “[t]o hold otherwise would be to set the Board up for one ambush after another.” *Quazite Div. of Morrison*

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*Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497-98 (D.C. Cir. 1996); *United Food and Commercial Workers Union Local 204 v. NLRB*, 506 F.3d 1078, 1087 (D.C. Cir. 2007).

In any event, the contention is without merit. As shown above, the Board found that the overall decision to integrate AG into Lucent and close AG's operations—of which the integration of the two bargaining units was a part—was done for core entrepreneurial reasons. The Union has never argued otherwise. The only argument that the Union raises (belatedly)—that the decision to integrate the two bargaining units was animated by costs related to the telephone equipment installers—is, as the Board, found, directly contradicted by the record evidence. (UER 28; Tr 523, 526, BSER 77, 103.)<sup>9</sup>

The Union next asserts that the Board misapplied *First National Maintenance*. (UBr 26-30.) Like the Union's untimely argument about labor costs, the Court is jurisdictionally barred from considering it, because it was never raised before the Board. In its Decision and Order, the Board largely re-wrote the judge's decision and explicitly stated (UER 25, 27 & n.7) that it was addressing a theory that the administrative law judge had not; namely, Lucent's argument that

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<sup>9</sup> There is no merit to the Union's claim (UBr 21) that Lucent undertook the decision to integrate the two units "to avoid the scheduled wage and per diem reopening provisions of the AG-Union" collective-bargaining agreement. A wage reopener provision in AG's collective-bargaining agreement with the Union had nothing to do with the decision to integrate the two units. This argument is nothing more than a spinoff of the Union's argument about alleged "labor costs."

the decision to integrate the two bargaining units was exempt from bargaining under *First National Maintenance* as a part of a core entrepreneurial matter. The Union, however, did not file a motion for reconsideration of the Board's decision, in which it should have raised any concerns it now says it has about the Board's application of the *First National Maintenance* framework of analysis.

Accordingly, it is jurisdictionally barred from doing so for the first time in its appellate brief. *See* Section 10(e) of the Act and pp.22-23.

In any event, the challenge gets the Union nowhere. The Union implicitly asserts (UBr 23) that the Board erred in its characterization of the overall decision to integrate AG into Lucent, of which the integration of the two units was a part. In this regard, the Union cites to footnote 22 of *First National Maintenance*, in which the Supreme Court noted that it was not “intimat[ing] a position on “*other* types of management decisions [besides partial closings of operations].” *Id.* at 686 n.22 (emphasis supplied). Contrary to the Union's apparent suggestion (UER 23), the instant case does not involve an “other” type of management decision; the integration of the two units was most definitely part of an overall integration of AG's operations and a closing of AG's operations. It did not involve other matters, such as subcontracting, relocation, or the transfer of work from a group of represented employees to unrepresented employees. Notably the Union does not

point to any evidence that would remotely undermine the Board’s finding in this regard.

Further, the Union does nothing to advance its cause by citing (UBr 23-29) cases that are plainly irrelevant to the present case. Stated briefly, none of the cases cited by the Union (UBr 23-29) involved the type of large-scale entrepreneurial change that occurred here—that is, the decision to close the operations of a stand-alone subsidiary in order to increase the economic profitability of the overall enterprise.<sup>10</sup>

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<sup>10</sup> For example, in *Westinghouse Electric Corporation*, 313 NLRB 452, 452-53 (1993), which the Union cites (Br 29), the Board explicitly found that the employer’s transfer of work *did not* occur in the context of a change in the scope or direction of the enterprise. Similarly, in *Holmes & Narver*, 309 NLRB 148 (1992), the Board specifically found that the decision to consolidate work in that case did not constitute a core entrepreneurial decision. (The Union’s assertion (Br 29) that consolidations are mandatory subjects of bargaining “per se” is simply wrong, and would read *First National Maintenance* totally out of existence.) To take two other examples, *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300 (D.C. Cir. 2003) and *Geiger-Ready Mix Co. v. NLRB*, 87 F. 3d 1363 (D.C. Cir. 1996)—aside from not involving the type of entrepreneurial decision of which the integration of the bargaining units was a part—dealt with another matter not at issue here, namely, the transfer of work from represented employees to unrepresented employees.

Finally, there is no merit to the Union’s assertion (UBr 33) that Lucent had to show that “external” factors beyond its control animated its decision to integrate the two bargaining units. Not surprisingly, the Union is unable to cite any case in support of this proposition, which is, in any event, irrelevant, and not part of the analysis under *First National Maintenance*.

In sum, the Union's attempts to unsettle the Board's reasonable finding that the decision to integrate the two units could not be separated out for bargaining from the overall integration of AG's operations into Lucent are unavailing. The arguments are not properly before the Court, because the Union had ample opportunities to raise them before the Board but chose not to. And, in any case, they offer no reason for disturbing a finding that is, after all, entitled to special deference. *See* pp.15-17.

**II. THE BOARD DID NOT ABUSE ITS BROAD  
DISCRETION BY CONFINING THE REMEDY  
FOR THE EFFECTS-BARGAINING VIOLATION  
TO A CEASE-AND-DESIST ORDER AND A NOTICE-  
POSTING REQUIREMENT**

As shown above, although the Board dismissed the allegation that Lucent and AG had unlawfully failed to bargain over the decision to integrate the unit of AG installers with the unit of Lucent installers, it did find that Lucent and AG unlawfully failed to bargain with the Union over the *effects* of that decision. To remedy this violation, the Board entered a cease-and-desist order and a notice-posting requirement. The Board reasonably determined that, in the unusual circumstances of the case, the additional effects-bargaining remedies set out in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), were unwarranted. As we now show, the Board acted well within its indisputably broad discretion in fashioning a remedy for this violation that reflected the circumstances of the case.

### **A. Applicable Principles and Standard of Review**

As the Supreme Court has stated, Section 10(c) of the Act (29 U.S.C. § 160(c)) “charges the Board with the task of devising remedies to effectuate the policies of the Act . . . .” *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). It is settled that the Board’s remedial discretion in selecting appropriate remedies for unfair labor practices is “exceedingly broad, and is to be given special respect by reviewing courts.” *General Teamsters Local No. 162 v. NLRB*, 782 F.2d 839, 844 (9th Cir. 1986). Accordingly, the Board’s remedial decisions are to be set aside only for a “clear abuse of discretion.” *Calif. Pacific Medical v. NLRB*, 87 F.3d 304, 311 (9th Cir. 1996). *Accord NLRB v. National Medical Hospital of Compton*, 907 F.2d 905, 910 (9th Cir. 1990). Such an abuse occurs “if it is shown that the order is a patent attempt to achieve ends other than those that can be fairly said to effectuate the policies of the Act.” *NLRB v. C.E. Wylie Const. Co.*, 934 F.2d 234, 236 (9th Cir. 1991).

### **B. The Board Did Not Abuse Its Broad Remedial Discretion by Determining that, in the Circumstances of the Case, the Remedies for the Effects-Bargaining Violation Should Be Limited to a Cease-and-Desist Order and a Notice-Posting Requirement**

As the Board stated (UER 28), the typical remedy in effects-bargaining cases is the one set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). The *Transmarine* remedy requires (in addition to cease-and-desist and notice-

posting provisions), a bargaining order, limited to requiring that the employer bargain over the effects of the decision, and some backpay.<sup>11</sup> However, as the Board further stated (UER 28-29), a *Transmarine* limited bargaining order and backpay remedy is not awarded in every effects-bargaining case. It is settled that, in fashioning a remedy for an effects-bargaining violation, the Board may consider any particular or unusual circumstances—just like it can in fashioning a remedy for any other violation. (UER 28.) *See, e.g., Compact Video Services*, 319 NLRB 131, 131 n.1 (1995), *enforced*, 121 F.3d 478 (9th Cir. 1997).

The Board did nothing more here than take the circumstances of the case into consideration and tailor a remedy that reflected those circumstances. As the Board explained (UER 28), the facts demonstrate that, as a practical matter, there was no need for a *Transmarine* bargaining order. There was simply “little or nothing over which to bargain, and AG installers suffered no detriment from Lucent’s failure to bargain with the Union.” (UER 29.) Notably, there was *no contention* that the terms and conditions of employment that the AG installers received following the integration into the CWA-represented unit were in any way inferior to the terms and conditions of employment they had received before the

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<sup>11</sup> The *Transmarine* backpay remedy is a limited one, because it is principally intended to effectuate effects bargaining. (UER 28.) Thus, no backpay accrues if the Union fails to request effects bargaining within a specified time, or ceases to bargain with the employer in good faith. Backpay also ceases to accrue when the parties reach agreement or arrive at a bona fide impasse. *Id.* at 846.

integration. (UER 29.) As the Board stated (UER 28-29), the former AG installers retained their full pay, full benefits, and full seniority. (BSER 120, 134-50.)

Indeed, when the CWA engaged in effects bargaining with Lucent, it achieved a positive result for its new constituency of former AG installers. (UER 28.) The Board reasonably pointed out that, had Lucent been required to bargain with *both* the CWA and the Union, the former AG installers may well have suffered detriments—such as diminished seniority rights—in light of the greater bargaining power of the larger CWA unit. (UER 29; BSER 105.)

The Board also noted other reasons for why the mechanical imposition of a bargaining order in these circumstances would have been unwise. As the Board explained (UER 29), “it is difficult to say” what theoretical benefits the Union could have achieved for the former AG installers, in light of the fact that those employees suffered no detriment. Moreover, the reality of the matter is that the CWA is now the union representing the installers, and it would simply not effectuate the purposes of the Act to turn back the clock and artificially impose the Union on the scene to compete with the CWA. As the Board observed (UER 29), “[a]ny agreement reached with [the Union] would likely be disruptive of the agreement reached between [Lucent] and CWA, the extant representative.” The Board was fully entitled to take these practical considerations into account in deviating from the usual approach under *Transmarine*.

The Board also reasonably found (UER 29) that, in the circumstances, the limited backpay remedy typically granted under *Transmarine* was also unwarranted. As a baseline matter, a *Transmarine* backpay remedy is primarily designed to effectuate a bargaining order. (UER 29.) As shown above, however, there was no need for a bargaining order. Granting a backpay remedy in such circumstances—that is, circumstances in which the former AG installers suffered no actual detriment for the effects-bargaining violation—would, as the Board pointed out (UER 29), “result only in a backpay windfall to former AG installers.” It can scarcely be said that the purposes of the Act would be effectuated by letting that happen. Further, it is settled that remedies cannot serve a punitive purpose. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940).

In sum, the Board reasonably determined that the circumstances of this case did not require a bargaining order or a backpay remedy. The remedies it entered—a cease-and-desist order and a notice-posting requirement—were sufficient to ameliorate the effects of the violation.

**C. The Union’s Contentions Are Untimely, and the Court Is Therefore Jurisdictionally Barred from Considering Them; in any Event, the Contentions Are Without Merit**

Tellingly, the Union does not even acknowledge the indisputable principle that the Board is entitled to exercise broad discretion in fashioning remedies.

Instead, it merely raises an untimely—and therefore jurisdictionally barred—assertion that the Board should have entered a *Transmarine* remedy.

The Union alleges (UBr 27-30), for the first time, that former AG installers were economically “harmed” by certain events that occurred after the integration. In particular, the Union, again without citing to any particular portions of the record, seems to argue that former AG installers suffered economic consequences, such as layoffs and lowered wage rates and per diems, that they would not have suffered had they remained in a separate bargaining unit. But, again, the Union never raised this argument in its exceptions (BSER 154-57) or in a motion for reconsideration of the Board’s decision. Thus, the Court is jurisdictionally barred from considering it. *See* Section 10(e) of the Act and pp.22-23. Indeed, contrary to its untimely attempt to raise this argument now, the Union actually argued, during the hearing before the administrative law judge, that assertions such as the ones it now seeks to make were irrelevant to the complaint allegation. Specifically, the Union’s counsel argued that testimony about whether AG employees would have fared better under Lucent’s collective-bargaining agreement with the CWA or AG’s collective-bargaining agreement with the Union with respect to post-integration layoffs was irrelevant to the issues raised by the complaint. (Tr 701-04, BSER 107-110.) The administrative law judge sustained the General Counsel’s and Union’s objections to the admission of such testimony

on the grounds that such testimony would be speculative and irrelevant. (Tr 703, BSER 108, 110.)

Further, it is unclear what the Union is seeking to accomplish by speculating (UBr 16-18, 32-33) at length about alleged post-integration economic “harms.” Such allegations have nothing to do with the issue of whether Lucent and AG were obligated to bargain with the Union over the decision to integrate the two bargaining units. As shown above, that decision was wrapped up in the overall core entrepreneurial decision to integrate AG into Lucent, and was unrelated to labor costs. Thus, the Union’s comparative analysis of cherry-picked portions of the different collective-bargaining agreements—which amounts to nothing more than its own, subjective guesswork about the relative merits of the provisions—is entirely irrelevant. Indeed, as noted above, the Board’s decision specifically noted that there was *no contention* before it that the terms of conditions and employment received by the former AG installers after their integration into the CWA-represented Lucent installer unit were in any way inferior to the terms and conditions of employment that they had received prior to the units’ merger. (UER 29.) If the Union wanted to preserve its ability to argue otherwise, it should have done so in a motion for reconsideration. However, as previously noted, the Union actually argued at the hearing that evidence of this nature was irrelevant. (Tr 701-04.)

In any event, the claim is meritless. The Union’s speculation hardly forms a basis for disturbing the Board’s reasonable finding that the former AG installers suffered no detriment as a result of the integration of the bargaining units, and that, among other things, they retained their full seniority, full pay and full benefits. (UER 29; BSER 104, 120.)<sup>12</sup>

As a final stab at unsettling the Board’s finding, the Union argues (UBr 36-44) that the Board should have remanded the case to the administrative law judge “for further evidence” regarding appropriate remedies. This contention too is untimely, as it appears, for the first time, in the Union’s appellate brief, and the Court is jurisdictionally barred from considering it. *See* Section 10(e) of the Act and pp.22-23 In essence, in asking that the Court remand the case for the taking of further evidence, the Union is only trying to circumvent its failure to raise

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<sup>13</sup> The Union argues (Br 34) that the Board’s citations to *Compact Video Services*, 319 NLRB 131 n.1 (1995), *enforced*, 121 F.3d 478 (9th Cir. 1997), *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990), and *National Terminal Baking Corp.*, 190 NLRB 465 (1970) were misplaced. The argument is without merit. The Board cited those cases for the principle that, in fashioning an effects-bargaining remedy, it may consider any particular or unusual circumstances of the case. The Board’s authority to take such matters into consideration in fashioning remedies is beyond dispute.

Finally, *Holly Farms Corporation*, 311 NLRB 273, 278 (1993), which the Union discusses (UBr 34-35) at length, does nothing to advance its cause. In that case, unlike here, employees were constructively terminated. And, as the Board noted (UER 27 & n.5), *Holly Farms* involved an unlawful withdrawal of recognition, which did not occur in the present case.

arguments that it had every opportunity to put before the Board. In any event, none of the cases it cites (UBr 37-43) has anything to do with the Board's reasonable exercise of discretion in fashioning remedies.

In sum, the Union's untimely and meritless arguments provide no grounds for concluding that the Board abused its broad remedial discretion.

## **CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court deny the Union's petition for review of the Board's Order.

## **STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

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April 2008

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 21, AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

LUCENT TECHNOLOGIES

Intervenor

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\* No. 07-72750  
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\* Board Case No.  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains \_\_\_\_\_ words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC  
this 28th day of April, 2008

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No. 07-72750

Board Case No.  
33-CA-14450

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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